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No. 94-905

In the
Supreme Court of the United States
October Term, 1994

GLENN NAKATA, ALVIN K. L. LAU, and JON DAVID WHITTINGTON,

Petitioners,

vs.

STATE OF HAWAII; JAMES H. DANNENBERG, in his capacity as Judge of the District Court of the First Circuit, State of Hawaii, and all other District Court Judges of the State of Hawaii,

Respondents.

Brief in Opposition to the Petition for a Writ of Certiorari.

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THE QUESTION PRESENTED

Whether this Court has jurisdiction to review the Hawaii Supreme Court's decision to apply retroactively its holding in *State v. Nakata,* 76 Haw. 360, 878 P.2d 699 (1994), which held that first-time Driving Under the Influence of Intoxicating Liquor offenders were not entitled to jury trials, where the Hawaii Supreme Court's decision was based upon independent and adequate state law grounds?

LIST OF PARTIES AFFECTED

The decision of the Hawaii Supreme Court affects all pending cases for first-time Driving Under the Influence of Intoxicating Liquor offenders who demanded jury trials.

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STATEMENT OF THE CASE

The police arrested Petitioners GLENN NAKATA, ALVIN LAU, and JON DAVID WHITTINGTON ("Petitioners"), on July 30, 1990, June 10, 1990, and "sometime before May 4, 1993," respectively (the record does not reflect Petitioner Whittington's exact arrest date), for the offense of Driving Under the Influence of Intoxicating Liquor ("DUI"), in violation of Section 291-4, Hawaii Revised Statutes ("H.R.S."). *See State v. Nakata*, 76 Haw. 360, 878 P.2d 699, 701- 02 and n 4 (1994); *see also* Appendix A to Petitioners' Petition For A Writ of Certiorari ("Petition"). The instant charges were Petitioners' first DUI offenses, and each Petitioner requested a jury trial. *Nakata*, *supra*, 878 P.2d at 702.

At the time of the arrests of Petitioners Nakata and Lau, the statutory penalty under Section 291-4, H.R.S. for a first DUI conviction included a minimum of forty-eight hours but not more than 180 days of imprisonment. *Nakata*, *supra*, 878 P.2d at 703 and n 5. A first-time DUI offender could also be sentenced to a fourteen-hour alcohol abuse rehabilitation program, a ninety-day license suspension, seventy-two hours of community service work, and a fine of not less than $150 but no more than $1,000. *Nakata*, *supra*, 878 P.2d at 703.

Effective August 1, 1991, the 1990 legislative amendment to Section 291-4, H.R.S. reduced the maximum term of imprisonment for a first DUI conviction from 180 days to thirty days. *Id.* The 1990 legislative amendment also gave the sentencing court the discretion to order the installation of an "ignition interlock system," a device which could be affixed to a vehicle's ignition system and which prevents the

vehicle from being started without first testing a sample of the driver's breath for blood-alcohol concentration. *Nakata*, *supra*, 878 P.2d at 703 and n 7.

In 1993, the Hawaii legislature enacted Act 128, 1993 Session Laws of Hawaii 179 ("Act 128"), which became effective on May 21, 1993. *Nakata*, *supra*, 878 P.2d at 701, 703. Act 128 provided for the reduction of the maximum term of imprisonment for a first DUI conviction from thirty days to five days, and eliminated the ignition interlock system provision. *Id.* In enacting Act 128, the Hawaii legislature stated clearly its intent to eliminate the first DUI offender's option of having a jury trial. *Id.* The Hawaii legislature also expressly provided for the retroactive application of Act 128 to all pending first-offense DUI cases. *Id.* The Hawaii legislature stated, in pertinent part:

> It is the intent of the legislature that individuals charged with the offense of driving under the influence of intoxicating liquor as a first time offender shall not be entitled to a jury trial.
>
> The purpose of this Act is to reduce the penalties for first time offenders so that there can be no question that, as to first time offenders, the offense is a "petty offense" in the constitutional sense, to which no right to jury trial attaches. The legislature finds that those offenders who are convicted repeatedly of driving under the influence of intoxicating liquor represent a serious social problem. They have been unwilling to modify their behavior and represent a continuing dangerous presence on the

roadway. First time offenders, however, represent less of a threat to society, as most will respond to corrective action.

The amended penalty provisions for first time offenders shall be retroactive for all pending first time offense cases for driving under the influence of intoxicating liquor.

It is the intent of the legislature that the reduced penalties provided for in the Act apply to all pending first offense cases. The legislature further intends that by making the reduced penalties provided for in this Act retroactive to pending cases, it be made clear that such first offenders are not entitled to a jury trial, as the offense is a "petty offense" in the constitutional sense.

Act 128, Section 1, 1993 Sessions Laws of Hawaii at 179-80 (emphasis supplied); *see also Nakata*, *supra*, 878 P.2d at 704, 708.

After Act 128 became effective, Respondent State of Hawaii ("Respondent"), moved to remand the cases of Petitioners Lau and Nakata to the district court for bench trials. *Nakata*, *supra*, 878 P.2d at 701. The First Circuit Court of the State of Hawaii ("circuit court"), consolidated Petitioners' cases, and on June 30, 1993, issued findings of fact (*see* Appendix D to the Petition), in reserving the following two questions of law to be decided by the Hawaii Supreme Court:

1. Whether the amendments to the sentencing provisions of H.R.S. [Section] 291-4 provided in Act 128, Session Laws of Hawaii, Regular Session of

> 1993, effective May 21, 1993, eliminate[ ] the right to jury trial for defendants charged with a first offense under H.R.S. [Section] 291-4.
>
> 2. If the amendments to the sentencing provisions of H.R.S. [Section] 291-4 provided in Act 128, Session Laws of Hawaii, Regular Session of 1993, effective May 21, 1993, do eliminate the right to jury trial, whether the deprivation of such a right may be applied retrospectively to alleged offenses occurring prior to the enactment of the Act.

Nakata, *supra*, 878 P.2d at 702; *see also* Appendix D to the Petition.

With respect to Petitioner Whittington, following his arrest for DUI, he demanded a jury trial in the state district court on May 4, 1993. *Nakata*, *supra*, 878 P.2d at 702 and n 4. The state district court denied Petitioner Whittington's demand based upon the Hawaii legislature's enactment of Act 128, and set Petitioner Whittington's bench trial. *Nakata*, *supra*, 878 P.2d at *702; see also* Appendix G to Petition. Petitioner Whittington subsequently filed a "petition for writ of prohibition and/or mandamus." *Nakata*, *supra*, 878 P.2d at 702. Inasmuch as the Hawaii Supreme Court's "disposition of the reserved questions would also dictate the disposition of Whittington's petition[,]" the Hawaii Supreme Court consolidated the cases of all three Petitioners. *Id.*

The Hawaii Supreme Court answered the first reserved question, *i.e.*, whether a first-time DUI offender had a right to jury trial, in the negative.

Nakata, *supra*, 878 P.2d at 704-713. In reaching that decision, the court found that under federal law a first-time DUI offender had no such right. *Nakata*, *supra*, 878 P.2d at 704-06. Under the court's federal law analysis, the court found that the sixth amendment to the United States Constitution provided for a speedy and public trial by an impartial jury in all criminal prosecutions. *Nakata*, *supra*, 878 P.2d at 704. However, the court found that this right is not absolute, as the sixth amendment's guaranty of a jury trial did not extend to "petty offenses." *Id.*, quoting *Duncan v. Louisiana*, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 *reh'g denied, 392 U.S. 497, 88 S.Ct. 2270, 20 L.Ed. 2d 1412* (1968), and *Blanton v. North Las Vegas*, 489 U.S. 538, 109 S.Ct. 1289, 103 L.Ed.2d 550 (1989).

The Hawaii Supreme Court held that, under federal law, the first DUI offense is presumed constitutionally petty. *Nakata*, *supra*, 878 P.2d at 706. The court based its holding in large part upon the fact that the maximum authorized term of imprisonment for the offense is only five days. *Nakata*, *supra*, 878 P.2d at 704-05, quoting *Blanton*, *supra*. Moreover, the court further found that the additional possible "mix of penalties"— which included a ninety-day driver's license suspension, fourteen hours of alcohol abuse rehabilitation classes, seventy-two hours of community service work, a fine between $150 and $1,000, proof of financial responsibility before being eligible to reapply for a driver's license as required by statute, and other collateral costs—did not "overcome the federal presumption that such offense is petty." *Nakata*, *supra*, 878 P.2d at 705, quoting *United States v. Nachtigal*, __ U.S. __, 113 S.Ct. 1072, 122 L.Ed.2d 374 (1993); *see also Blanton*, *supra*. The Hawaii Supreme

Court accordingly ruled that, under the United States Constitution, Petitioners were not entitled to jury trials for their first DUI offenses under Section 291-4, H.R.S., as amended by Act 128. *Nakata*, *supra*, 878 P.2d at 706.

The Hawaii Supreme Court, however, did not rest its decision in *Nakata* upon its analysis of federal law. Instead, the court made clear its decision was based upon independent state law. In so doing, the court held that, under the provisions of the Hawaii Constitution, a defendant has a right to a speedy and public trial by an impartial jury in all criminal prosecutions. *Nakata*, *supra*, 878 P.2d at 706. The court held, however, the right is not absolute and does not attach to petty offenses. *Id.*, quoting *State v. Wilson*, 75 Haw. 68, 856 P.2d 1240 (1993). In reaching the conclusion that the first DUI offense is a petty offense, the Hawaii Supreme Court applied its three-pronged test as set forth in *Wilson*. Under the *Wilson* test, the court was required to consider: (1) the treatment of the offense at common law; 2) the gravity of the offense; and (3) the authorized penalty. *Nakata*, *supra*, 878 P.2d at 706.

As the offense of DUI did not exist at common law, the Hawaii Supreme Court found the first prong of the *Wilson* test to be inapplicable. *Nakata*, *supra*, 878 P.2d at 713 n. 20. In its analysis of the second prong of the *Wilson* test, the gravity of the offense, the court acknowledged as controlling the legislature's view of the critical difference between first-time DUI offenders and repeat DUI offenders. *Nakata*, *supra*, 878 P.2d at 708. In so doing, the court stated that the legislature's "unequivocal...statement provide[d] a strong indication of society's view of first offense DUI."

Nakata, supra, 878 P.2d at 708. The court pointed out that the legislature, in promulgating Act 128, stated that the DUI offenders who represented a serious social problem were those "who [we]re convicted repeatedly of [DUI]." *Id.* On the other hand, the legislature found that first-time DUI offenders represented "less of a threat to society, as most will respond to corrective action." *Id.*

With respect to the final prong of the *Wilson* analysis, the authorized penalty, the Hawaii Supreme Court considered the statutorily authorized penalty and the 1990 and 1993 legislative amendments regarding the same. *Nakata, supra*, 878 P.2d at 707-08. The court recognized that in providing for a maximum term of imprisonment of five days, the legislature intended to make clear that there would be "no question" that it viewed the first-time DUI offense as constitutionally petty. *Nakata, supra*, 878 P.2d at 708. Moreover, the court declared, "it is now clear that the legislature has *always* viewed first time DUI offenses as petty." *Nakata, supra*, 878 P.2d at 708 (emphasis supplied and omitted; citation omitted). The court concluded:

> In sum, applying the three-part test from *Wilson*, we now hold that a charge of first-offense DUI under *H.R.S.* [Section] 291-4, as amended by Act 128, is constitutionally petty. The distinction between first and repeat offenders in *Act* 128's legislative history is critical, and the maximum mix of statutory penalties does not compel a different result. Being a constitutionally petty offense, no right to jury trial attaches to first-offense DUI.

Nakata, supra, 878 P.2d at 713.

The Hawaii Supreme Court also determined the second reserved question, *i.e.*, whether its decision in *Nakata*, holding that the right to jury trial did not attach to a first DUI offense, could be retroactively applied to all pending first DUI offenders who demanded jury trials, in the negative. *Nakata, supra*, 878 P.2d at 713-17. As they did below, Petitioners contend in their instant Petition that the Hawaii Supreme Court's retroactive application of its holding in *Nakata* "depriv[es] them of a vested substantive and fundamental right" in violation of due process. *Nakata, supra*, 878 P.2d at 715; *see also* Petition at 27-30.

In deciding whether retroactive application of its decision in *Nakata* would be fundamentally fair, the Hawaii Supreme Court utilized its "selective-retroactive doctrine" test as set forth in *State v. Ikezawa*, 75 Haw. 210, 857 P.2d 593 (1993). *Nakata, supra*, 878 P.2d at 716-17. Under the "selective-retroactive doctrine" test, the court was required to consider the following three factors in deciding whether the court would, in its discretion, apply a decision retroactively: (1) the purpose to be served by the newly announced rule; (2) the extent of reliance by law enforcement authorities on the old standards; and (3) the effect on the administration of justice of a retroactive application of the new standards. *Nakata, supra*, 878 P.2d at 716, quoting *Ikezawa*, 75 Haw. at 220, 857 P.2d at 598 (citing to *State v. Santiago*, 53 Haw. 254, 492 P.2d 657 (1971), and *Russell v. Blackwell*, 53 Haw. 274, 492 P.2d 953 (1972)). As stated by the Hawaii Supreme Court, "implicit in these factors is the concept of fairness." *Id.*

The Hawaii Supreme Court acknowledged that

its "selective-retroactive doctrine" test was not the test utilized by the United States Supreme Court to determine whether new rules of criminal law would be applied retroactively. *Nakata*, *supra*, 878 P.2d at 717. The court indicated that under federal law, limits on retroactivity of new rules of criminal law and procedure had been eliminated, and that "all newly declared...rule[s] must be applied retroactively to all criminal cases pending on direct review." *Nakata*, *supra*, 878 P.2d at 717 (emphasis supplied), quoting *Griffith v. Kentucky*, 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987), and *Harper v. Virginia Dept. of Taxation*, 509 U.S. __, 113 S.Ct. 2510, 125 L.Ed.2d 74, 85 (1993). The court then said:

> We acknowledge that this recent United States Supreme Court case law, by overruling the doctrinal foundation of Hawaii case law, could call into question our continued adherence to *Ikezawa*. However, relying on independent state law grounds, we choose to follow the more flexible test we reiterated in *Ikezawa* when determining whether to retroactively apply decisions of state law made by this court.

Nakata, *supra*, 878 P.2d at 717 (emphasis supplied).

The Hawaii Supreme Court held that Petitioners had failed to show that they would be substantially prejudiced by the retroactive application of its decision in *Nakata*. *Nakata*, *supra*, 878 P.2d at 717. In fact, the court held, Petitioners "would receive an impartial trial, albeit a non-jury trial," and if convicted, would face lesser penalties. *Id.* Therefore, the court ruled, "retroactive application of [the holding in *Nakata*] to

pending cases passes the [fundamental fairness] test enunciated in *Ikezawa*. Accordingly, we answer the second reserved question in the affirmative." *Nakata*, *supra*, 878 P.2d at 717, 718-19.

SUMMARY OF THE ARGUMENT

The Hawaii Supreme Court's decision to give retroactive effect to its holding in *Nakata* rested upon independent and adequate state law. Therefore, under this Court's own rules, there is no jurisdiction over the matter.

In analyzing whether a first-time DUI offense was petty or serious under the terms of the Hawaii Constitution, the Hawaii Supreme Court applied its own three-pronged test as set forth in *Nakata*. The three factors the *Nakata* court was required to consider are: (1) the historical treatment of the offense at common law; (2) the gravity of the offense; and (3) the authorized penalty. The court's three-pronged test required the consideration of the offense's authorized penalty, a factor minimally required under the federal analysis when determining whether an offense is petty or serious. Thus, the Hawaii Supreme Court's decision that the right to jury trial did not attach to the first-time DUI offense, because the offense was constitutionally petty, rested on independent and adequate state law grounds.

In deciding it would retroactively apply its holding in *Nakata* to first DUI offenders who requested jury trials, the Hawaii Supreme Court applied its own "selective-retroactive doctrine" test, which it expressly held to be the relevant test under state law. The "selective-retroactive doctrine" test requires an analysis

of three factors: (1) the purpose to be served by the newly announced rule; (2) the reliance placed on the previous view of the law; and (3) the effect on the administration of justice of a retroactive application of the new rule. This Court, however, does not utilize the "selective-retroactive doctrine" test, but rather mandates that newly announced rules of criminal law be applied retroactively. Thus, the Hawaii Supreme Court's decision to apply retroactively its decision in *Nakata* rested upon independent and adequate state law as well.

Inasmuch as the Hawaii Supreme Court's decision rested on independent and adequate state law grounds, this Court, pursuant to its own rules, has no jurisdiction to review the court's decision in *Nakata*. Furthermore, Petitioners have not shown in their petition, as they must in order for this Court to accept review, that the Hawaii Supreme Court decided a federal question in a way that conflicts with either the decision of another state court of last resort or of a United States court of appeals, or with applicable decisions of this Court. As such, this Court should decline review of their Petition.

ARGUMENT

I. THIS COURT HAS NO JURISDICTION TO REVIEW THE HAWAII SUPREME COURT'S DECISION TO APPLY RETROACTIVELY ITS HOLDING IN *NAKATA* TO ALL PENDING FIRST-OFFENSE DUI OFFENDERS WHO DEMANDED JURY TRIALS, WHERE THE HAWAII SUPREME COURT

EXPRESSLY RESTED ITS DECISION ON INDEPENDENT AND ADEQUATE STATE LAW GROUNDS.

Petitioners argue that the Hawaii Supreme Court's retroactive application of its decision in *Nakata* was "inherently prejudicial and unfair so as to constitute a violation of Due Process under the United States Constitution." Petition at 27. Petitioners identify the "prejudice" they suffered from the court's decision to apply retroactively *Nakata* as the divesture of the fundamental right to a jury trial, which had been extended to them under previous Hawaii case law. Petition at 26, 28-29. Notwithstanding Petitioners argument, they fail to provide either federal or state authority in support of their argument.

A. THE APPLICABLE LAW.

With respect to petitions brought pursuant to 28 U.S.C. Section 1257, it is well-settled that this Court will not review a state court decision which is clearly based on adequate and independent state law grounds. *Coleman v. Thompson*, 501 U.S. 722, 111 S.Ct. 2546, 115 L.Ed.2d 640, 655 (1991). In *Coleman*, this Court stated:

> This Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment. This rule applies whether the state law ground is substantive or procedural. In the context of

> direct review of a state court judgment, the independent and adequate state ground doctrine is jurisdictional. Because this Court has no power to review a state law determination that is sufficient to support the judgment, resolution of any independent federal ground for the decision could not affect the judgment and would therefore be advisory.

Coleman, *supra*, 115 L.Ed.2d at 655 (citations omitted); *accord*, *Michigan v. Long*, 463 U.S. 1032, 1041, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983) ("If the state court decision indicates clearly and expressly that it is alternately based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision.").

B. THE HAWAII SUPREME COURT'S HOLDING IN *NAKATA* THAT THE RIGHT TO JURY TRIAL DID NOT ATTACH TO THE CONSTITUTIONALLY PETTY FIRST-TIME DUI OFFENSE RESTED ON INDEPENDENT AND ADEQUATE STATE LAW GROUNDS.

In *Nakata*, the Hawaii Supreme Court held that the right to jury trial did not attach to constitutionally petty offenses. *Nakata*, *supra*, 878 P.2d at 706-13. In so holding, the court made clear that under Article I, Section 14 of the Hawaii Constitution the first-time DUI offense is constitutionally petty. *Nakata*, *supra*, 878 P.2d at 706-13, quoting *Wilson*, *supra*, 856 P.2d 1240, 1243 (citing to *State v. Shak*, 51 Haw. 612, 466 P.2d 422, *cert. denied*, 400 U.S. 930, 91 S.Ct. 191, 27

L.Ed.2d 190 (1970) (defendant charged with a petty crime does not have the right to a jury trial)).

In declaring that the first DUI offense is constitutionally petty under the provisions of the Hawaii Constitution, the Hawaii Supreme Court in *Nakata* utilized the three-pronged test which it first announced in *Shak*, "refined" in *State v. O'Brien*, 68 Haw. 38, 41-43, 704 P.2d 883, 885-87 (1985), and reaffirmed as the relevant test under the state constitution in *Wilson*. *Nakata*, *supra*, 878 P.2d at 706-07. The *Wilson* test requires a court to consider: (1) the treatment of the offense at common law; (2) the gravity of the offense; and (3) the authorized penalty. *Nakata*, *supra*, 878 P.2d at 706; *see Wilson*, 75 Haw. at 74, 856 P.2d at 1244. Because the *Wilson* test includes the "authorized penalty" factor in its analysis of whether the first DUI offense is a petty or serious offense, the test comports with the standard recognized by this Court in *Blanton*. *See* Rule 10.1(c), Rules of the Supreme Court of the United States.

In *Blanton*, the United States Supreme Court held that the right to jury trial is not absolute, and does not attach by right to petty offenses. *Blanton*, 489 U.S. at 541. Thus, in determining whether the right to jury trial attaches to a particular offense, the Court first determines whether the offense is petty or serious. *Id.* In making such a determination, the *Blanton* Court stated that primary emphasis must be placed on the maximum term of imprisonment because "it is the most powerful indication whether an offense is serious." *Blanton*, 489 U.S. at 542.

In holding that a first DUI offense is petty under the Hawaii Constitution, the Hawaii Supreme Court in *Nakata* considered the five-day maximum

authorized period of imprisonment for the first offense, as well as the additional possible statutory "mix of penalties" as required by *Blanton*. *Nakata*, *supra*, 878 P.2d at 706-13; *see Blanton*, 489 U.S. at 542. The court also considered the historical treatment of the offense, and the societal perception of the gravity of the offense. *Nakata*, *supra*, 878 P.2d at 706-13. By requiring a court to consider the treatment of the offense at common law and the societal view of gravity of the offense, in addition to the authorized penalty, the *Wilson* test is clearly more rigorous than its federal counterpart, and as a result inures to Petitioners' benefit. *See Trucking Assns v. Smith*, 496 U.S. 167, 178-79, 110 S.Ct. 2323, 110 L.Ed.2d 148 (1990) (held, federal law sets certain minimum requirements which the states must meet, but the states may exceed those minimal federal requirements in providing relief under state constitutions).

In sum, in holding that the first-time DUI offense is constitutionally petty under the Hawaii Constitution, the Hawaii Supreme Court utilized its own, unique *Wilson* three-pronged test. Although the Hawaii Supreme Court in *Nakata* acknowledged the federal test in *Blanton*, the court did not base its decision that the first DUI offense is constitutional petty—and thus did not afford such offenders the right to jury trial—on that test. The court did, however, include the federal test in its own three-pronged test, and thus provided Petitioners with what was minimally required under federal law. *Smith*, *supra*.

Therefore, inasmuch as the Hawaii Supreme Court expressly rested its holding in *Nakata* upon independent state law, and included in its analysis what was required under federal law as well, the

court's decision thus rested upon independent and adequate state law grounds. *Coleman*, *supra*, 115 L.Ed.2d at 658. As such, this Court has no jurisdiction to review the matter. *Coleman*, *supra*, 115 L.Ed.2d at 655; *Long*, 463 U.S. at 1041.

C. THE HAWAII SUPREME COURT'S DECISION TO APPLY RETROACTIVELY ITS HOLDING IN *NAKATA* RESTED ON INDEPENDENT AND ADEQUATE STATE LAW GROUNDS.

Petitioners contend that the Hawaii Supreme Court's decision to apply retroactively its holding in *Nakata* violated due process concerns. *See* Petition at 27-30. However, as will be demonstrated below, the Hawaii Supreme Court's decision to apply retroactively its holding in *Nakata* was fundamentally fair, and thus proper.

In deciding to apply retroactively its decision in *Nakata*, the Hawaii Supreme Court employed its own "selective-retroactive doctrine" test first announced in *Santiago*, and reaffirmed in *Ikezawa*. *Nakata*, *supra*, 878 P.2d at 716-17. The "selective retroactive doctrine" test entails an analysis of three factors: (1) the purpose to be served by the newly announced rule; (2) the reliance placed on the previous view of the law; and (3) the effect on the administration of justice of a retroactive application of the new rule. *Id.*

The Hawaii "selective-retroactive doctrine" test is qualitatively more demanding than its federal counterpart. Indeed, federal law categorically mandates that "new rule[s] for the conduct of criminal prosecutions [are] to be applied retroactively to all cases, state

or federal, pending direct review or not yet final, with no exception[.]" *Griffith v. Kentucky*, 479 U.S. at 328; *accord Harper, supra*, 125 L.Ed.2d at 85. This Court has held, however, notwithstanding the above mandate, "[w]hen questions of state law are at issue, state courts generally have the authority to determine the retroactivity of their own decisions." *Smith*, 496 U.S. at 117, quoting *Great Northern R. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 53 S.Ct. 145, 77 L.Ed. 360 (1932).

Thus, where the United States Supreme Court mandates the retroactive application of all new criminal decisions, the Hawaii Supreme Court evaluates the merits and demerits of retroactive application of newly announced criminal decisions under state law. The Hawaii Supreme Court will not retroactively apply a newly announced rule of criminal law if retroactive application causes injustice or hardship. *See e.g., Ikezawa supra* (held, no retroactive application of new rule of criminal law if the defendant would suffer injustice and hardship as a result). Mindful of this Court's mandate that all new rules of criminal law or procedure shall be applied retroactively, the Hawaii Supreme Court in *Nakata* stated:

> We acknowledge that this recent United States Supreme Court case law, by overruling the doctrinal foundation of Hawaii case law, could call into question our continued adherence to *Ikezawa*. However, relying on independent state law grounds, we choose to follow the more flexible test we reiterated in *Ikezawa* when determining whether to

> retroactively apply decisions of state law made by this court.

Id. (emphasis supplied).

In so holding, the court determined that Petitioners would suffer neither injustice nor hardship from the retroactive application of its decision in *Nakata*. *Nakata*, *supra*, 878 P.2d at 717. The court noted that Petitioners would still receive a fair trial before a neutral magistrate, and would face lesser penalties under the amended version of the DUI statute. *Id.*

Consequently, the Hawaii Supreme Court's decision to apply retroactively its holding in *Nakata* rested upon independent and adequate state law grounds *Coleman*, *supra*, 115 L.Ed.2d at 658. Therefore, this Court has no jurisdiction over the matter (*Coleman*, *supra*, 115 L.Ed.2d at 655; *Long*, 463 U.S. at 1041), and should honor the Hawaii Supreme Court's decision. *See Great Northern R. Co.*, *supra* (held, "the federal constitution has no voice upon the subject" of whether a state court may decline to give its decision retroactive effect).

CONCLUSION

Based on the foregoing argument and authority, this Court should not entertain review of the Petition. The Hawaii Supreme Court's decision to give retroactive effect to its holding in *Nakata*—holding that the right to jury trial does not attach to first DUI offenses—was based upon independent and adequate state law grounds. Thus, this Court has no jurisdiction over the matter.

Petitioners have not shown in their Petition, as they must in order for this Court to accept review, that the Hawaii Supreme Court either decided a "federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals[,]" or decided a "federal question in a way that conflicts with applicable decisions of this Court." *See* Rule 10.1(b) and (c), Rules of the Supreme Court of the United States. Indeed, in view of the fact that the Hawaii Supreme Court rested its decision in *Nakata* on independent and adequate state law grounds, Petitioners are not able to make such a requisite showing. As such, this Court should decline review of their Petition.